In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1085

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. B) is not yet reported. The "letter opinion" of the district court denying a motion by petitioner for a new trial (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1964. By order of Justice Brennan the time for filing a petition for a writ of certiorari was extended to and including May 11, 1964. The petition for a writ of certiorari was filed on May 8,

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1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for conspiring to transport forged and stolen securities in interstate commerce.

2. Whether statements by a co-conspirator should have been excluded because they referred to securities other than those introduced into evidence.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the District of New Jersey on the conspiracy count of a three-count indictment charging him and J. Tom Grimmett with violations of 18 U.S.C. 371 and 2314. Petitioner was sentenced to imprisonment for five years. The court of appeals affirmed the conviction in a brief per curiam opinion.

The conspiracy count charged an agreement among petitioner, co-defendant J. Tom Grimmett, and Michael D. Favata and Patrick McLaren (co-conspirators but not defendants), to transport securities between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma, knowing the securities to have been stolen and forged. The indictment alleged that, as part of the conspiracy, petitioner and others would sell to Grimmett approximately $1,000,000 of stolen securities to be forged and pledged as collateral for loans (R. 7a–8a).

Petitioner's contentions relate chiefly to the sufficiency of the evidence to connect him with the conspiracy charged in the indictment. Petitioner does

not challenge the sufficiency of the evidence, which was overwhelming, to prove the conspiracy itself.

The facts concerning the conspiracy, and petitioner's role therein, can be summarized as follows. In the spring and summer of 1961, various securities were stolen from the homes of Bernard Hans, in Forest Hills, New York, and Fred W. Plate in Morristown, New Jersey (R. 15a–30a). These securities were pledged by Grimmett in New York City on November 30, 1961, as collateral for a loan by an Oklahoma insurance company (R. 117a–133a, 338a–347a). Petitioner and others supplied the securities to Grimmett. Favata and McLaren contributed to the conspiracy by forging endorsements on the securities and by preparing various documents needed to pledge them (R. 68a–161a, 246a–279a).

Petitioner's connection with the conspiracy was proved largely through the testimony of two witnesses—Sidney Orseck and Larry Gullihur. Orseck, a New York City lawyer, testified that petitioner took part in a meeting at Orseck's office in late September or early October, 1961, which was also attended by Grimmett and an imposter identified as "Bernard Hans" (R. 32a, 33a, 41a). Grimmett introduced the bogus "Mr. Hans" as a person who was interested in exchanging certain "blue chip" securities, as well as money, for stock in a company in which Grimmett was active. Grimmett stated that he intended to use the "blue chip" securities as collateral for a loan, and that he could secure the loan "at any bank; or, if need be, he'd take them back home and have them pledge, [*sic*] the bank in which his brother was the president in Oklahoma, or some insurance company

out there" (R. 37a, 39a, 48a). Orseck, who was to prepare the necessary legal papers, asked to see the securities, whereupon Grimmett asked petitioner for them. Petitioner handed the securities to Grimmett (R. 37a, 51a, 52a). Orseck testified that most of Grimmett's remarks were directed to petitioner, and that petitioner knew the nature of the securities which "Hans" was going to exchange with Grimmett. When Grimmett complained that the value of the securities was insufficient for his needs, petitioner replied that "he didn't have the others with him, but that he had them and would bring them tomorrow or some later time" (R. 39a). The securities which petitioner turned over to Grimmett were those which had been stolen from Bernard Hans and Fred W. Plate.

Because the securities which had been brought to the meeting were not endorsed, the meeting was adjourned at Orseck's insistence. "Hans" was to have the securities endorsed and his signature guaranteed by the following day (R. 41a). The next day, petitioner, Grimmett, and "Hans" returned to Orseck's office. The securities were still not endorsed, however, and while the others remained, "Hans" left the office, allegedly to go to his bank where his signature could be verified (R. 42a). When "Hans" failed to return, petitioner and Grimmett left (R. 43a, 44a).

The securities were pledged by Grimmett with the aid of Favata and McLaren on November 30, 1961. On January 1, 1962, Larry Gullihur, who was Grimmett's son-in-law, went to New York City at Grim-

mett's request to deliver two checks, each in the amount of $25,000, to petitioner (R. 362a–364a). Accompanied by two unidentified persons, petitioner appeared at Gullihur's hotel room to collect the money, but when Gullihur tendered the checks petitioner said that "he had to have cash and his people would not accept checks, they had to have cash" (R. 366a). After conferring with Grimmett by telephone, Gullihur cashed the checks and gave petitioner the proceeds in bills of relatively small denomination (R. 366a–368a).

The government also elicited testimony as to various statements by Grimmett to Favata and McLaren in which Grimmett referred to "Milt" as the source of the stolen securities (R. 79a, 88a, 95a, 96a, 110a, 115a, 333a). In a few of these statements "Milt" was identified by Grimmett as petitioner, Milton Parness (R. 229a, 232a, 329a, 331a). The trial court instructed the jury that the statements could not be considered against petitioner unless independent evidence proved that petitioner was a member of the conspiracy (R. 483a, 484a, 497a, 499a).

ARGUMENT

1. Petitioner's statement that "there is not an iota of independent proof connecting petitioner to the alleged conspiracy", other than hearsay statements by Grimmett (Pet. 4), is refuted by the record. It ignores the testimony of Orseck, which showed that petitioner attended the meeting at Orseck's office at which the stolen securities were exhibited and at which Grimmett discussed his intention to pledge the

securities, and the testimony of Gullihur that he paid $50,000 in cash to petitioner at Grimmett's request. The testimony of these two witnesses was sufficient to link petitioner to the conspiracy and thus to establish a foundation for admitting into evidence hearsay statements by Grimmett identifying petitioner as the source of the stolen securities.

Petitioner also alleges that the government failed to show that he knew the securities would be sent into interstate commerce. The record shows that during the meeting at Orseck's office Grimmett stated his intention to pledge the securities "at any bank, or, if need be, he'd take them back home and have them pledge, [*sic*] the bank in which his brother was the president in Oklahoma, or some insurance company out there" (R. 39a). On cross-examination petitioner acknowledged that this statement had been made (R. 449a–450a). Petitioner also indicated on cross-examination that at one time he had intended to take the stolen securities and pledge them with a life insurance company, apparently located in Chicago (R. 442a). The evidence thus showed sufficient awareness on petitioner's part that the securities were likely to be transported in interstate commerce to satisfy the requirement of the statute. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2).[1]

[1] The district court, in denying petitioner a new trial, pointed out that the securities indicated on their face that the transfer agents were located in states other than New York. Petitioner, who had the securities in his possession at the meeting at Orseck's office, was therefore on notice that the stock certificates would be transported interstate if the stocks had to be sold rather than pledged.

2. Petitioner contends it was error for the trial court to allow into evidence hearsay statements by Grimmett identifying him as the source of the stolen securities, on the ground that these statements were made in connection with securities other than those referred to in the indictment. The background for this contention is that in a motion for a bill of particulars, petitioner inquired whether the securities referred to in counts two and three of the indictment were the same as those mentioned in count one; the government replied that they were. At the trial, the government introduced only one batch of securities into evidence, those pledged by Grimmett on November 30, 1961. Grimmett's statements to Favata and McLaren identifying petitioner as the source of the securities were made generally in connection with efforts by Grimmett, after November 30, to obtain a second batch of securities from petitioner. Petitioner argues that because only the first group of securities was introduced, these statements should have been excluded.

Petitioner's claim is without merit. Grimmett's statements were clearly admissible under paragraph four of count one of the indictment, which reads:

> "It was further a part of the aforesaid conspiracy that approximately $1,000,000 of stolen securities would be sold by MILTON PARNESS and other [*sic*] unknown to the Grand Jury to J. TOM GRIMMETT and would be forged, altered, counterfeited and then pledged as collateral for loans." [R. 7a.]

The fact that only one batch of securities was introduced into evidence did not prevent the government from eliciting testimony relating to other securities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DAVID N. ELLENHORN,
Attorneys.

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